United States Court of Appeals

for the Second Circuit

REPLY BRIEF

74-2591

To be argued by
Stanley Nemser

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

2/27

No. 74-2591

ALBERT KAUFMANN,
Plaintiff-Appellant,

-against-

5.15 P.M

MARY WELLS LAWRENCE, CHARLES MOSS, RICHARD T. O'REILLY, JOHN V. BURNS, FRANK G. COLNAR, FREDERICK L. JACOBS, BARRY E. LOUGHRANE, MARTIN STERN, STANLEY G. DRAGOTI, CATHARINE GIBSON, E. DONALD CHALLIS and WELLS, RICH, GREENE, INC.,

B

Defendants-Appellees,

P/S

and

WARREN J. KRATKY, ARNOLD M. GRANT, TROY V. POST and EMILIO PUCCI,
Defendants.

On Appeal From the United States District Court for the Southern District of New York

REPLY BRIEF OF PLAINTIFF-APPELLANT

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REPLY BRIEF OF PLAINTIFF-APPELLANT

PRELIMINARY STATEMENT

The serious impact of the "going private" phenomenon upon the public investor has resulted in the recent announcement by the S.E.C. of proposed Rules 13e-3A and 13e-3B pursuant to Section 13(e) of the Exchange Act. [See, Exchange Act Release No. 34-11231 (Feb. 6, 1975)]. The announcement portion of that Release is reported in Current Vol., CCH Fed.Sec.L.Rep.,

¶ 80,104; and the proposed Rules are set forth in Vol. 2, CCH Fed.Sec.L.Rep., ¶¶ 23,704, 23,705.* Plaintiff's Principal Brief on this appeal was filed prior to the issuance of that Release. The Release is referred to in defendants' Brief, at page 9.

These proposed Rules are highly significant here. The substance of the proposed Rules indicates the S.E.C.'s accord with the position taken by S.E.C. Commissioner A. A. Sommer, Jr. in his speech, "Going Private": A Lesson in Corporate Responsibility", [Current] CCH Fed.Sec.L.Rep. ¶ 80,010, discussed in plaintiff's Principal Brief. They pertinently demonstrate that "going private" schemes, in the context of facts such as present in the instant WRG plan and scheme (specifically earmarked by Commission Sommer in his speech for condemnation), come within the prohibitions of Section 10(b), Rule 10b-5, and Section 14(e) of the Exchange Act.

To stop at the threshold any possible contention, in

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* On September 9, 1974, the S.E.C. announced a Public Fact-Finding Investigation in the Matter of Beneficial Ownership, Takeovers, and Acquisitions by Foreign and Domestic Persons. [Release No. 34-11003, as amended by Release No. 34-11088, reported in CCH, ¶¶ 79,956, 80,004]. Hearings in that public investigatory proceeding began on Nov. 13, 1974 (CCH, ¶ 80,004, p. 84,612). In connection with one of the specific inquiries of that proceeding, i.e., relating to "going private", the S.E.C. has stated the following, inter alia, in its Feb. 6, 1975 Release (CCH, ¶80,104, p. 85,091):

> "Moreover, the Commission has received a number of letters from shareholders expressing concern about the fairness of so-called 'going private transactions, and from members of the investment community expressing concern about the impact of such transactions on the confidence of investors in the market place."

In its Release of Feb. 6, 1975, supra, the S.E.C. also announced that it has ordered a public investigatory and rulemaking proceeding, including public hearings, relating to so-called "going private" transactions by public companies and their affiliates. [CCH, ¶ 80,104, p. 85,089].

relation to the proposed Rules, that by implication the S.E.C. does not presently consider the Federal securities laws applicable to "going private" transactions, or that such laws are not presently applicable, the S.E.C. expressly negated any such possible contention, in its Release of February 6, 1975 [CCH Fed.Sec.L.Rep., ¶ 80,104, p. 85,090]:

> "These rule proposals are in no way intended to limit the present applicability of existing provisions of the Federal securities laws and the rules and regulations promulgated thereunder relating to "going private" transactions."

The most striking aspect of these proposed Rules is that practically every claimed misrepresentation or omission, or concealment, urged by the plaintiff in the case at bar, is <u>expressly</u> deemed material and the subject of mandatory, full, and truthful disclosure under the proposed Rules. The few that are not specifically expressed in the proposed Rules, come clearly within the requirement of proposed Rule 13e-3A(c)(1)(xx). In these respects, the proposed Rules contain exemplifications of what have been judicially mandated standards of disclosure under Rule 10b-5 and Section 14(e).

In plaintiff's Principal Brief, there are discussed the judicial authorities which, in "freeze-out" cases brought under either Rule 10b-5 or common law, have required that the defendants carry the burden of showing that the transactions involved are based on valid business purposes and are fair. In this respect, proposed Rule 13e-3B substantiates that Rule 10b-5 and Section 14(e) are violated, as fraudulent, deceptive or manipulative acts or practices, where a "freeze-out" transac-

tion is entered into by the issuer without a valid business purpose and on unfair terms.

It is clear on the face of the proposed Rules that the WRG Exchange Offer and the plan and scheme of the defendants to cause WRG to go private cannot pass muster under either Rule 13e-3A or Rule 13e-3B. They lend full support to the claims alleged in plaintiff's complaint, and the contentions raised before the District Court and reiterated in plaintiff's Principal Brief, that the WRG Exchange Offer and the over-all plan and scheme of the defendants to cause WRG to go private are violative of Section 10(b), Rule 10b-5, Section 14(e), and common law principles.

RESPONSE TO DEFENDANTS' COUNTERSTATEMENT OF ISSUES PRESENTED FOR REVIEW

At page 2 of their Brief, the defendants set forth their version of the issues presented. It is submitted that their statement omits various important issues on this appeal, which are set forth at pages 3-7 of plaintiff's Principal Brief. Moreover, items 1 and 2 of their issues presented are based on their misconception of the jurisdiction of this Court on the appeal, the nature of this action, the equity powers of this Court (or, if remanded, the equity powers of the District Court) in relation to the Exchange Offer. It will be shown in this Brief that this appeal is far from moot, and that plaintiff is not seeking new relief in the context of this appeal.

Item 4 of the defendants' statement of the issues suffers from two principal deficiencies. The defendants state

their issue presented, as follows: "Whether the District Court acted within its discretion in declining to exercise jurisdiction over questions of state law." This is a "straw" issue, it is submitted. Not one reference was made by Judge Carter in his decision (720a) to "state law" or to his exercise of discretion in "declining" to exercise jurisdiction in that respect. Judge Carter just considered his interpretations of the Federal securities laws with respect to the issues before him, and stopped there. Cf. Drachman v. Harvey, 453 F.2d 722 (2nd Cir. 1972, en banc). Also, the "questions" which defendants consider under Point II(A)(2) of their Brief to be exclusively "questions of state law" are not solely state law matters, but come within the purview of the Federal securities laws.

RESPONSE TO DEFENDANTS' COUNTERSTATEMENT OF THE CASE

The defendants' Statement of the Case (Defts Brief, pp. 3-10) omits many important record facts, and in certain significant areas purported facts are not at all supported by their record references. Plaintiff stands on his Statement of the Facts (Princ.Brief, pp. 12-44), and will discuss here only certain of defendants' statements.

At page 3 of their Brief, the defendants set forth the results of the Exchange Offer, indicating that 1,166,395 shares of WRG stock were tendered and accepted, and in exchange WRG paid the tendering stockholders $3,499,185 (or $3. per share) in cash, and issued $9,331,160 principal amount in debentures. [The figures set forth in plaintiff's Principal Brief, pp.43-44, were based on a WRG press release, the substance of which app-

eared in the Wall Street Journal, Jan. 7, 1975, p. 18, a few days prior to the filing of that Brief. Apparently, on final adjustment 815 additional shares were accepted under the Exchange Offer. The final figures thereby show that only 200,411 shares of WRG common stock are left in the hands of the public investors. The insiders hold 265,052 shares, constituting 56.94% of the remaining outstanding stock. A total of 465,463 shares thereby remain outstanding.

Thus, while prior to the Exchange Offer the public stockholders owned 1,366,806 shares with the benefit of a listing on the New York Stock Exchange, the public stockholders now own only 200,411 shares; they have lost their listing on the New York Stock Exchange; and, as alleged in the complaint to be part of the plan and scheme of the defendants, as asserted in the motion papers on the motion for preliminary injunction before the District Court, as stated on numerous occasions at the hearing by plaintiff's counsel that the public stockholders remaining would be faced with an illiquid market for their stock, such has now come to unfortunate fruition. The so-called agreement of White, Weld, the Dealer Manager of the Exchange Offer, to make an Over-the-Counter market in WRG common stock, as represented in the Prospectus, is a sham. The evasive and argumentative responses to questions at the hearing by William Brian Little, First Vice President of White, Weld, are clearly indicative of this planned grievous result (108a-111a). The trading in WRG stock in the Over-the-Counter market is so light that none of the major newspapers carry the bid and

asked quotations for that stock. WRG common is not even reported in the extra listing of Over-the-Counter securities in those newspapers. On a number of trading days since WRG common has become an Over-the-Counter security, no WRG shares have been traded at all. In their Brief, at page 8, the defendants distortively state: "The O-T-C market is the market which accomodated all trading in WRG stock for a year and a half after its first public offering in 1968." They neglect, however, to add that <u>409,900</u> shares were sold under the 1968 offering, and that upon completion of that offering there were 1,500,600 common shares outstanding (218a, 223a). In fact, it was the 409,900 shares outstanding with the public that formed the predicate for the listing of WRG common on the American Stock Exchange, commencing May 11, 1970 (253a).

Before turning to what is a highly significant statement in defendants' Brief, which has the effect of penetrating deeply into the fraudulent and deceptive scheme involved here, we first quote from plaintiff's complaint:

> " 18. During 1974, and prior to September 4, 1974, the defendants devised a plan and scheme to fraudulently, illegally, and wrongfully eliminate entirely the public as common stockholders of WRG Inc. and to make said corporation a private preserve for the defendant directors herein, all for the personal benefit and aggrandizement of the individual defendants herein and certain other officers owning Common Stock of WRG Inc.; whereby for no proper or legal corporate business purpose, all the public common stockholders (presently owning approximately 83.5% of the outstanding Common Stock of WRG Inc.) would be forced to sell their shares of said Common Stock to WRG Inc. either (1) by tender of said shares to WRG Inc. under an Exchange Offer for cash and WRG Debentures having a value substantially below the true value of the Common Stock of WRG Inc., or (2) as to any public common stockholders who do not tender

their shares under the Exchange Offer, by forced sale at artifically low prices, after expiration of the Exchange Offer and the delisting of the Common Stock from the New York Stock Exchange and the cessation of a viable public market for the Common Stock. The defendants herein have conspired and acted in concert to carry out the said plan and scheme having the following objectives and purposes, among others:

(1) to forceably and wrongfully deprive the public common stockholders of WRG Inc. from continuing their interests as stockholders and majority owners of WRG Inc. and from participating in the growth of WRG Inc. which has annually reported a progressive increase in revenues and earnings;

(2) to wrongfully effect 100%, or at least initially 66-2/3%, ownership of WRG Inc. by the defendants Lawrence and the other defendant directors of WRG Inc. who presently own 13.9% of the outstanding Common Stock;

(3) to wrongfully increase the percentage of ownership of the outstanding Common Stock of WRG Inc. by the defendant Lawrence from 7% at the present time to at least 50.6%;

(4) to wrongfully increase the earnings per share and the book value per share attributable to the Common Stock of WRG Inc. owned by the defendant directors, at the expense and to the detriment of the public stockholders of WRG Inc.;

(5) to wrongfully advantage the defendant directors by causing WRG Inc. to purchase the shares of Common Stock owned by the public common stockholders at a price substantially below book value and the intrinsic value of the Common Stock of WRG Inc.;

(6) to wrongfully cause the delisting of the Common Stock of WRG Inc. from the New York Stock Exchange;

(7) to wrongfully eliminate a viable market for the Common Stock of WRG Inc.;

* * *

(12) to wrongfully gain for the defendant directors of WRG Inc. at least 66-2/3% voting control of WRG Inc., so that they can, as they intend to do in the event all shares of Common Stock owned by the public are not tendered under the Exchange Offer, force the retirement of the balance of Common Stock held by the public stockholders."

Thus, while the Exchange Offer was a step in a general fraudulent plan, as alleged, which under the authorities must be viewed as a whole with all its composite implications [Pepper v. Litton, 308 U.S. 295, 312 (1939); Buffum v. Peter Barceloux Co., 289 U.S. 227, 232 (1933), discussed infra] in relation to defendants' contention of mootness, we at this juncture focus on the general fraudulent plan in the context of false and misleading statements and concealment perpetrated by the defendants. [Complaint, ¶24(a) - "The Prospectus fails to disclose the true purposes and objectives of the Exchange Offer, and the underlying plan and scheme, as hereinabove alleged in paragraph '18' of this Complaint"].

At pages 13-14 of the Prospectus (71a-72a), the defendants set forth the "Background and Purpose" of the Exchange Offer.* The reasons and purposes set forth at those pages, i.e., the purported benefits to flow from "private status" and as a "privately held agency" (including "reduced concern for the immediate impact of costs upon earnings and earnings upon the value of the stock";"greater freedom and flexibility in the payment of cash and other remuneration" -- "stock options based on book value"; "greater confidentiality

* The defendants in the case at bar had a three-fold legal obligation to set forth in the Prospectus the full, legitimate, and truthful business purposes and reasons for the Exchange Offer, and to carry the burden thereof:

(1) Securities Act of 1933 - Form S-1, Item 4 - Sales Otherwise Than For Cash -- "general purposes of the distribution"; Instruction - "general effect of the plan".

(2) Representation of Listing - implied representation of continuing the listing. The legal doctrine enunciated in United Funds, Inc. v. Carter Products, Inc., ['61-'64] CCH Fed. Sec.L.Rep., ¶ 9[illegible]88 (Balt.City Cir.Ct. 1963), adverted to by Commissioner So[illegible]r in his "Going Private" speech, and discussed
(footnote continued on next page)

afforded by private status") are all grounded upon the hypothesis of securing such "private status". The affidavit of defendant Lawrence submitted in opposition to the motion for preliminary injunction (341a-353a) similarly grounds the reasons and purposes for the Exchange Offer upon such hypothesis. However, not any mention is made in the Prospectus (or in defendant Lawrence's affidavit) as to the impact upon these reasons and purposes should the Exchange Offer not result in such "private status", i.e., not all of the publicly held shares were tendered. Would the defendants disregard the remaining public stockholders and proceed with increased costs through higher salaries, stock options based on book value, implementation of confidentiality by excluding the remaining public stockholders from proper disclosure, and increased costs in general with reduced concern for immediate impact of such costs upon earnings? There is total concealment and nondisclosure of intent in that situation insofar as the Prospectus is concerned. The seriousness of this matter should be viewed from the defendant's own

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* (continued forward from previous page)

at pages 22-25 of plaintiff's Principal Brief, carries with it the application of the Federal securities laws including Rule 10b-5 and Section 14(e) in relation to the Exchange Offer and the alleged fraudulent plan to effect the delisting of the WRG common stock. [It is so alleged in ¶25(b) of the complaint (23a)]. The defendants make no reference whatever to this violation in their Brief.

(3) Burden of establishing a legitimate corporate purpose as a basis for exculpation from fraudulent, deceptive and manipulative acts and practices in connection with the "freeze-out." [Rule 10b-5, Section 14(e), and common law principles].

stated proposition that the so-called benefits that would flow from "private status" could not be accomplished as a"public" corporation.

The defendants were faced with a dilemma resulting from their own fraud and deceit. They did not want to disclose in the Prospectus their intent at the time of issuance of the Prospectus that they had a then present intention of taking the second "mop-up" step of the freeze-out plan and scheme, in the event that not all public stockholders tendered. To have expressly stated their intent in that respect would, of course, have directly negated their (false) representation that the Exchange Offer was "voluntary". On the other hand, to have stated in the Prospectus that notwithstanding that not all of the public stockholders might tender under the Exchange Offer, the defendants would proceed to implement the so-called benefits to be derived from "private status", they would have demonstrated the sham nature of the so-called purposes and reasons for going private. This in itself would also have constituted a breach of fiduciary duty to the extreme, i.e., reduce the number of shares held by the public stockholders to "chewable size", and then cast such remaining stockholders adrift.

At the hearing, defendant Lawrence was cross-examined on this aspect (459a-470a). Though attempting to evade this confrontation through equivocable and unresponsive answers, she finally had no alternative but to admit that the second "mop-up" step would indeed be taken, but they had not decided

at that juncture the particular method that would be used to accomplish the total "freeze-out". (469a).

Now, astoundingly, in an attempt to obfuscate the foregoing dilemma resulting from the misrepresentations, omissions, and concealment in connection with the purported purposes and reasons for "going private", and defendant Lawrence's clear admission of then present intent to take the second "mop-up" step if not all publicly held shares were tendered under the Exchange Offer, the defendants come forward at page 7 of their Brief with <u>new terminology</u>, i.e. "<u>substantial reduction</u>" in the publicly-held shares as a predicate for implementing all of the so-called benefits which would flow from "private status." One can look deeply and long at the record references cited by the defendants for their statement in that respect (they cite 72a, 349a, and 350a) and find nothing in the Prospectus or in defendant Lawrence's affidavit at the cited pages, other than "private status". In fact, defendant Lawrence conceded in her testimony, at 461a, that, "I mean there are a number of reasons for being private, your Honor, and most of those reasons, it is true, would not come into being unless the company was private."

Ironically, one statement of that particular paragraph at page 7 of defendants' Brief does ring true, but not in the sense intended by the defendants -- they state, "A substantial reduction in the number of publicly-held shares could also be expected to reduce investor and public interest * * *." That statement, it is submitted, should be considered in the context of the fraudulent plan and scheme alleged in relation

to the elimination of a liquid market for the publicly held WRG common stock.

Plaintiff submits that the entire narrative at pages 5-8 of defendants' Brief under the heading, "Exchange Offer" is not reflective of the facts in the record. The narrative is highly distortive of the facts, which is exemplified by the extreme statement that WRG found its future "bleak". (Defts. Brief, p. 6). No record reference is given for that statement -- there could be none, since the record shows that WRG has been and still is, and is considered by defendant Lawrence to be, a growth company -- "Yes, I have confidence in the continued growth of the company." (453a).*

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* In a footnote at page 4 of their Brief, defendants state that the results for fiscal year 1974 "show a decline". That statement is made in response to plaintiff's statement at page 32 of his Brief, that the results for the first ten months of WRG's fiscal year 1974 indicate that the full year's operations culminated in <u>higher billings</u> and <u>earnings</u> than for fiscal 1973. The defendants refer to the recently issued 1974 Annual Report, in which it is reported that 1974 net income amounted to $3,211,145 as compared with 1973 net income of $3,375,077. For 10 months ended Aug. 31, 1974, WRG reported net income of $2,388,561, as compared with $2,360,925 for the like period in 1973. (84a). However, the defendants fail to indicate that <u>gross billings</u> (a key indicator in the advertising field) increased for the 1974 fiscal year to $190,966,000 from the previous fiscal year's gross billings of $185,250,000, an increase of $5,710,000; and <u>total revenues</u> increased to $29,129,351 from the previous year's total revenues of $28,474,744. Moreover, the amount of "other office and general expense" (which does not include salaries and employee benefits) for the last two months of the 1974 fiscal exceeded in the aggregate the average monthly amount of such expense item for the prior ten months by $363,634. That excess probably included certain of the expenses relating to the Exchange Offer. <u>Book value per share</u> at the 1974 fiscal year-end increased to $10.77 from $9.48 at the 1973 fiscal year-end. The advertising industry forecasts a 6.1% increase of domestic advertising gross billings in 1975 to $28.16 billion. (New York Times, Dec. 18, 1974, p.76). In December 1974, WRG became the agency handling all of Bic Pen Corporation's national ballpoint-pen advertising. (New York Times, Dec. 17, 1974, p. 59).

At page 8 of their Brief, the defendants state their view of plaintiff's theory of the case. Plaintiff does not accept their statement, nor does plaintiff accept their view that plaintiff's theories "fall into three distinct categories." Plaintiff has set forth his theories in the Principal Brief -- they are not dichotomized into three "distinct categories". Moreover, plaintiff has not asserted a position that every "going private" situation is <u>per se</u> violation of the Federal securities laws. Plaintiff has applied the law as he deems it to be to the facts involved in the case at bar, and contends that there has been a blatant and wilfull violation of the Federal securities lawsand common law in connection with the fraudulent and deceptive and manipulative plan and scheme involved here to take WRG private, and to "freeze out" the public stockholders who owned <u>83.7</u>% of WRG, all for the enhancement and enrichment of the insiders and the effectuation of their control. In a railing editorial entitled, "<u>Squeezing Out Investors</u>, Business Week, November 2, 1974, p. 114, condemning the WRG "going private" scheme, an analyst is quoted as saying, "Wells, Rich management in effect sold their stock short by going public, and now they're covering by going private -- with the stockholders' money." Other commentators have practically uniformly condemned the WRG going private situation -- it has activated great concern in the business, financial, and securities communities. Needless to say, the S.E.C. has manifested grave concern about the going private situations in general; and Commissioner Sommer specifically condemned the WRG going private tactic.

I

RESPONSE TO POINT I OF DEFENDANTS' BRIEF

The defendants erroneously contend that this Court does not have jurisdiction on this appeal on the ground that the preliminary injunctive relief sought below has become moot in that the Exchange Offer has taken place. They also contend erroneously that plaintiff is seeking new relief on this appeal, and that such constitutes raising new issues in this Court.

The defendants concede (p. 12) that if this Court is in a position by mandatory injunction to reverse the transactions which have taken place, the appeal is not moot. Their only argument against the jurisdiction of this Court to issue such a mandatory injunction (or to remand to the District Court with instructions to issue such a mandatory injunction) is that certain of the WRG stockholders who exchanged their shares for WRG debentures may have sold their debentures. But, this very same type of argument was raised before this Court and rejected in <u>Chris-Craft Industries, Inc. v. Bangor Punta Corp.</u>, 426 F.2d 569 (2nd Cir. 1970 <u>en banc</u>)(Chris-Craft I); and in <u>Chris-Craft Industries, Inc. v. Bangor Punta Corp</u>., 480 F.2d 341 (2nd Cir. 1973)(Chris-Craft II), cert denied, 414 U.S. 924 (1973).

In <u>Chris-Craft I</u>, Chris-Craft and Bangor Punta were competitors, competing for control of the target company, Piper Aircraft Corporation. Chris-Craft moved for a preliminary injunction. The District Court denied the preliminary injunction. Chris-Craft had attacked, <u>inter alia</u>, Bangor-Punta's

exchange offer for Piper shares which had been consummated. On the preliminary injunction motion, Chris-Craft sought an order directing Bangor Punta <u>to offer the right to rescind to all persons who had tendered Piper shares to Bangor Punta pursuant to its exchange offer</u>; to refrain from acquiring further Piper shares; to refrain from effecting a merger of Piper and Bangor Punta; and to refrain from voting certain Piper shares which it had acquired for cash. The District Court denied the motion, citing both the lack of any irreparable injury to Chris-Craft if the motion were denied and the lack of any illegal behavior on the part of Bangor Punta. Chris-Craft then sought and received an expedited appeal to this Court.*

On the appeal, this Court expressly indicated that it had the jurisdiction to grant the right of rescission to the Piper stockholders who had tendered to Bangor Punta, notwithstanding that the Exchange Offer had been consummated. But, inasmuch as counsel for Bangor Punta had stipulated at argument that no Bangor Punta - Piper merger would be effected before the end of the litigation, this Court concluded that no injunction restraining the merger was needed, and no harm could result to Chris-Craft from declining to order the right of rescission before the merits of the case were adjudicated after trial.

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* In the case at bar, Judge Carter's decision was rendered in the afternoon of December 5, 1974. Plaintiff's counsel did not receive a copy of that decision until the late afternoon of that day. On the following morning, a Notice of Appeal was filed and forthwith on that day plaintiff filed a motion for expedited appeal. The motion was subsequently denied in part and granted in part. Plaintiff acted most diligently in appealing and in seeking an expedited appeal, it is submitted.

In the case at bar, as part of the relief sought in the complaint, plaintiff seeks declaratory relief declaring the Exchange Offer, all tenders thereunder, and all acceptances of tenders, invalid and null and void. Mandatory injunctive relief is also there sought, directing the return of all WRG shares tendered under the Exchange Offer. (25a).

It is also significant that notwithstanding the affirmance by this Court, en banc, of the denial of the preliminary injunction in Chris-Craft I, the Court nevertheless felt constrained to review the legal conclusions of the District Court with respect to its findings of a lack of any violations of the Federal securities laws. This Court stated in that respect:

> "However, we also feel compelled to pass on the district court's alternative holding that Bangor Punta did not violate the securities laws, for it is clear that this ruling below would determine the outcome of the trial on the merits. On this issue we disagree with the district court."

In the case at bar, by reason of the importance to the public interest of the legal matters involved in this "going private" litigation, and the applicability of the Federal securities laws to this situation, it is submitted that in all events this Court should pass on the legal conclusions of the Court below so that on the subsequent trial on the merits a proper application of the Federal securities laws will be followed. It is plaintiff's position, as shown in his Principal Brief and in this Reply Brief, that the Court below erred in its legal conclusions and ultimate findings of fact, and misapplied the applicable standards.

After remand in the Chris-Craft litigation, three separate but related civil actions were tried before Judge Pollack: *Chris-Craft v. Piper Aircraft*; *Bangor Punta v. Chris-Craft*; and *S.E.C. v. Bangor Punta*. In *Chris-Craft v. Piper Aircraft*, the lower court dismissed Chris-Craft's complaint; similarly the lower court dismissed Bangor Punta's complaint in its action against Chris-Craft. In *S.E.C. v. Bangor Punta*, the lower court concluded that *Bangor Punta be required to make an offer of rescission to former Piper stockholders who accepted the Bangor Punta exchange offer*; however, it declined to grant a permanent injunction against further violations.

This Court, in *Chris-Craft II*, heard consolidated appeals. The following rulings by this Court on those appeals are pertinent here:

(1) Just as in the case at bar, the consolidated appeals presented important questions of first impression involving the anti-fraud provisions of the Federal securities laws.

(2) On the appeal from the determinations in *Chris-Craft v. Piper Aircraft*, having reversed the lower court's conclusions as to violations of Sections 10b-6 and 14(e) and finding that such violations did occur for which Chris-Craft was entitled to relief, this Court concluded that it was incumbent upon it to provide "specific guidance to the district court as to the form of relief to be granted upon remand", because, inter alia, (a) the lower court did not reach the issue of relief to be granted, and (b) Chris-Craft had *limited its claim for relief at the lower court level to damages, but on appeal pressed its claim for equitable relief as well as damages*, and (c) certain of the questions

presented were of first impression. This Court concluded that the relief should include a judgment assessing damages against all of the defendants, jointly and severally; and that Bangor Punta should be denied the fruits of obtaining the Piper shares illegally, and, in that connection, the judgment should include an injunctive provision barring Bangor Punta from voting for a period of five years the Piper shares it obtained through the unlawful cash purchases and those it obtained through the exchange offer (except that the injunction would not apply to those Piper shares which are transferred to former Piper shareholders who take advantage of the rescission order granted in the S.E.C. v. Bangor Punta action). In connection with such relief, the Court pointed out that its direction to include those two relief provisions in the judgment to be entered on remand was not intended to foreclose the District Court from fashioning such additional relief as it may find necessary to implement this Court's opinion.

(3) The Court upheld the lower court's determination directing Bangor Punta to offer rescission to the former Piper stockholders who accepted the Bangor Punta exchange offer, except a condition was deleted. Upon rescinding, the former Piper stockholder was required to tender only the amount of securities he received plus dividends and interest paid (or due and payable) thereon. Deleted was a condition directed to those former Piper stockholders who prior to such rescission had sold their Bangor Punta securities received by them in the Exchange Offer -- that condition would have required such

rescinding stockholder to additionally tender a cash payment equal to the excess, if any, of his sales proceeds from the original Bangor Punta securities over his cost of repurchasing the substitute Bangor Punta securities which he tenders to Bangor Punta. This Court determined that such a condition would have been inequitable and would have rendered ineffective the rescission remedy. This Court directed that on remand the judgment be modified by deleting that condition from the rescission order.

In the case at bar, such an order directing WRG to make an offer of rescission to those WRG shareholders who tendered their shares under the Exchange Offer, would generally require the rescinding WRG former shareholder to tender for each share rescinded, the sum of $3.00 in cash and $8. principal amount of the WRG debentures plus interest paid (or due and payable) thereon, less dividends that would have been paid.

In opposing the rescission order on the appeal, Bangor Punta raised arguments similar to those interposed by the defendants on the instant appeal. In rejecting such arguments, this Court appositely stated:

> "BPC challenges the rescission order on the ground that a former Piper shareholder who has disposed of the BPC securities he received on the exchange offer should not be eligible for rescission. It argues that, since a Piper shareholder so situated could not obtain rescission if he brought the action himself, the SEC should not be permitted to seek rescission for him. <u>The defect in this argument is that a Piper shareholder could purchase substitute shares and demand rescission if he brought his own rescission action</u>. * * * [A] defrauded shareholder also can bring suit for rescission and restitution under § 10(b) of the 1934 Act, Errion v. v. Connell, 236 F.2d 447 (9 Cir. 1956), or under §29(b) of the 1934 Act, Geismar v. Bond & Goodwin, Inc.,

> 40 F.Supp. 876 (S.D.N.Y. 1941). Although the issue appears not to have been resolved, it is reasonable to assume with respect to such claims that a shareholder seeking rescission, even if he has disposed of his shares, should be permitted to tender substitute shares. See Restatement of Restitution §66(4) (1937); 3 Loss, Securities Regulation 1792-93 (2d ed. 1961, Supp. 1969)." (480 F.2d, p. 391) (Emphasis supplied)

In the case at bar, since the relief sought in the Complaint includes declaratory relief, to declare invalid the Exchange Offer, and tenders and acceptances thereunder, Sections 10(b) and 29(b) of the Exchange Act would be applicable to an order directing WRG to offer rescission.

That this appeal is far from moot is further supported by a long line of authorities. In Porter v. Lee, 328 U.S. 246, 251, 66 S.Ct. 1096, 90 L.Ed. 1199 (1946), the Supreme Court set forth the basic doctrine involved:

> "It has long been established that where a defendant with notice in an injunction proceeding completes the acts sought to be enjoined the court may by mandatory injunction restore the status quo."

Accord: Texas & New Orleans Railroad Co. v. The Northside Belt Railway Company, 276 U.S. 475, 479, 48 S.Ct. 361, 72 L.Ed. 661 (1928); Bowles v. Skaggs, 151 F.2d 817, 820 (6th Cir. 1945) -- " * * * [E]quity courts have, from early times, when equitable considerations have required the restoration of a status quo, issued mandatory injunctions or granted other affirmative relief responsive to the needs of parties invoking equity."

Nor is the jurisdiction of the Court of Appeals affected by mootness where the appeal is taken from a denial of a preliminary injunction, and the transaction sought to be

enjoined is consummated pending the appeal. Chris-Craft I, supra; Ramsburg v. American Investment Company of Illinois, 231 F.2d 333 (7th Cir. 1956); Jones v. S.E.C., 298 U.S. 1, 16-17, 56 S.Ct. 654, 80 L.Ed. 1015 (1936).

In Ramsburg v. American Investment Company of Illinois, supra, a stockholders derivative suit was brought to enjoin a proposed merger. The plaintiff moved for a preliminary injunction which, after hearing, was denied. The defendants completed the merger on or about the same day. The plaintiff appealed. No stay was sought pending appeal. The defendants moved to dismiss the appeal as moot. The Court of Appeals denied the motion, stating (231 F.2d, p. 336):

> "This argument must be examined in the light of the inherent power of a court of equity to afford mandatory relief. * * * Applying these decisions we are able to formulate the question for determination where, as here, a cause for injunctive relief is met by a contention of mootness because the status of the parties and of their relationship to the subject matter has changed. The decisive issue is whether the subject matter may yet be reached by the mandatory power of equity and the status quo restored. If so, the cause is not moot. * * * . And even where the subject matter has been so completely destroyed as to preclude restoration of the stauts quo, the court still has jurisdiction to grant incidental relief and the cause is not moot. Barrett v. Denver Tramway Corp., 3 Cir., 146 F.2d 701; United States v. Bates Valve Bag Corp., D.C. 39 F.2d 162.
>
> "Were this an appeal on the merits, therefore, clearly the cause would not be moot. * * * And we must conclude, we believe, that our mandatory power is rendered no less effective by the fact that the appeal is taken from an interlocutory order."

With respect to tender offers, this Court has clearly established that an appeal taken from denial of injunc-

tion (preliminary or permanent) is not mooted by consummation of the tender offer pending appeal. The Court has the power, whether or not invoked, to direct an offer of rescission. In cases in which competitors are seeking in contest to gain control of a target company (which is not present in the case at bar), the utilization of the injunctive relief process prior to consummation is naturally favored so that corrective steps may be taken (if possible) to permit the contest to continue. But, consummation of the tender offer prior to appellate determination of an appeal from the denial of injunctive relief does not affect its jurisdiction or its inherent equity powers to do equity and to mould its decree to the necessity of the particular case.* Chris-Craft I and II, supra; Symington Wayne Corp. v. Dresser Industries, Inc., 383 F.2d 840 (2nd Cir. 1967); Electronic Specialty Co. v. International Controls Corp., 409 F.2d 937 (2nd Cir. 1969); Butler Aviation International, Inc. v. Comprehensive Designers, Inc., 425 F.2d 842 (2nd Cir. 1970); Sonesta International Hotels Corp. v. Wellington Associates, 483 F.2d 247 (2nd Cir. 1973). See also, Broder v. Dane, [Current] CCH Fed.Sec.L.Rep. ¶ 94,875, p. 96,994 (SDNY 1974); General Host Corporation v. Triumph American, Inc. 359 F.Supp. 749 (SDNY 1973).

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*The four cases cited by defendants at pages 12-13 of their Brief, as principal support for their contention, are clearly not relevant here. In Sawyer v. Pioneer Mill Company, 300 F.2d 200 (9th Cir.), cert. denied, 371 U.S. 814 (1962), that Court cited the other three cases relied upon by defendants here, and indicated that in each (involving either corporate sale of assets or merger), the recipient or surviving corporation was not a party in the lawsuit, so that upon consummation of the transaction, the Court could not exercise any equity remedial powers. The same situation existed in Sawyer.

There is another important principal involved here, relating both to the jurisdictional aspect and the appropriate relief that may be granted in the circumstances, as sought by plaintiff on this appeal. As shown at pages 7-8 of this Brief, this action involves a continuing fraudulent, deceptive, and manipulative plan and scheme, of which the Exchange Offer was only one step, albeit an important one. In this situation, the following statement by the Supreme Court in Pepper v. Litton, supra, is apposite (308 U.S., p. 312):

> "But when there is added the existence of a 'planned and fraudulent scheme,' as found by the District Court, the necessity of equitable relief against that fraud becomes insistent. No matter how technically legal each step in that scheme may have been, once its basic nature was uncovered it was the duty of the bankruptcy court in the exercise of its equity jurisdiction to undo it. Otherwise, the fiduciary duties of dominant or management stockholders would go for naught; exploitation would become a substitute for justice; and equity would be perverted as an instrument for approving what it was designed to thwart. * * * In the first place, that lien was but a step in a general fraudulent plan which must be viewed in its entirety. The subsequent sale cannot be taken as an isolated step unconnected with the long antecedent events, all designed to defeat creditors."

Accord: Buffum v. Peter Barceloux Co., supra, 289 U.S., p. 232-- "The pledge was a step in a general plan which must be viewed as a whole with all its composite implications. Dean v. Davis, 242 U.S. 438, 444; Coder v. Arts, 213 U.S. 223, 224."

Moreover, in the case at bar, defendant Lawrence has testified that WRG management intends to take WRG fully private, which is part and parcel of the general fraudulent plan and scheme alleged in the complaint. In the context of tender offers consummated and claims of mootness, the Courts of Appeals

in continuing conspiracy situations have rejected such mootness arguments and have upheld their jurisdiction. GAF Corporation v. Milstein, 453 F.2d 709 (2nd Cir. 1971), cert. denied, 406 U.S. 910 (1972); B.F. Goodrich Company v. Northwest Industries, Inc., 424 F.2d 1349, 1357 (3rd Cir. 1970).

Turning to the contention of the defendants that the plaintiff is seeking new relief at the appellate level, such is not the fact.

It is plaintiff's position that he has established as a matter of law serious violations of the Federal securities laws and, also, of common law. It is further his position that the lower court erred in not granting preliminary injunctive relief; and that such error was grounded upon an erroneous interpretation of applicable law, erroneous conclusions of law, and misapplication of the standards involved. Plaintiff also met both standards required for the grant of preliminary injunctive relief. Sonesta International Hotels Corp. v. Wellington Associates, supra, 483 F.2d, p. 250.

In 9 Moore's Federal Practice, ¶ 110.25[1] (2d ed. 1973), it is stated:

> "Once a timely appeal is taken from an order made appealable by statute, the power of a court of appeals should be plenary to the extent that it chooses to exercise it. A court should not close its eyes to what is plainly there. To read 28 USC § 2106 in a technical way is to defeat its purpose. The spirit of the decision of the Second Circuit in Hurwitz v. Directors Guild of America, Inc., [364 F.2d 67 (2nd Cir. 1966), cert. denied, 385 U.S. 971 (1966)], deserves wide diffusion. In Hurwitz, an appeal was taken from an order denying a preliminary injunction. Persuaded by its study of the record that the plaintiffs were en-

> titled to judgment on the admitted facts as a matter of law, the court of appeals reversed with instructions to grant a permanent injunction. To be sure, the circumstances were unusual, but the decision stands for the larger, very salutary proposition that once a case is lawfully before a court of appeals, it does not lack power to do what plainly ought to be done."

In the case at bar, we find a drastic situation existing. 83.7% of the stockholders of WRG have been dislocated by the effects of the Exchange Offer and the fraudulent plan and scheme. They have either been forced out as WRG stockholders (either selling out in the public market or tendering under the Exchange Offer), or remain as WRG stockholders with the loss of the New York Stock Exchange listing and with an illiquid Over-the-Counter market in WRG stock.

A decree directing an offer of rescission to the former WRG shareholders who tendered would be a particularly appropriate remedy here. To the extent that such former WRG shareholders rescind, such would add to the potential liquidity of the market in WRG stock. Moreover, if such former shareholders rescind with respect to the extent of 200,000 shares, WRG would then come within the standards of the American Stock Exchange for listing of the WRG common stock on that exchange. [See, American Stock Exchange Company Guide, Supplement #2]. The 200,000 shares represented by the rescission plus the 200,411 shares presently publicly held, would constitute the share number required for listing, i.e., 400,000. Moreover, the requisite number of shareholders and market value of shares and net tangible assets and earnings would also be met.

Consequently, through this mode of relief, the former WRG shareholders will have a choice whether or not to rescind. Their choice would be made upon a full and proper disclosure of all the material facts involved and the Court determination granting them such choice. This form of rescission affords a basis to rectify some of the injuries perpetrated upon the public WRG stockholders by the defendants, by increasing market liquidity to the extent of WRG shares restored to the public shareholders upon such rescission, and by facilitating a listing of WRG stock once again on a national securities exchange.

The prohibitory relief sought, i.e., enjoining the defendants from acquiring directly or indirectly any of the WRG common stock presently public held is not "new relief"; such relief is designed to be supportive of the right of rescission. Such right of rescission, with the concomitant increase in market liquidity and listing on the American Stock Exchange would be frustrated if the defendants were able to defeat such relief by acquiring publicly held WRG stock which would thereby defeat liquidity and the possible listing on the American Stock Exchange.

The defendants created the present injurious situation. They should not be free to destroy the mode of relief which this Court or the Court below may determine should be applied here. The Court has the right to protect its grant of relief by preventing the wrongdoers from defeating the very purpose of the relief through the perpetration of steps in furtherance of their general fraudulent and wrongful plan and

scheme.

Moreover, the present posture of the WRG public stockholders is a gravely inferior one. The defendants through their wrongs now have the superior position. At the present time, with no listing and with no liquid market for their WRG stock, the public stockholders are easy marks for the defendants in their current superior position. Given the relief sought and the restoration of a liquid market and possible listing on the American Stock Exchange, the public stockholders would be elevated to a position in which they could protect their investment. That is a minimum right to which the public WRG shareholders, and those former shareholders who join them upon rescission, should be accorded. The temporary prohibition of acquisition of publicly held WRG stock by the defendants permits such redress. Moreover, the Court can set the period of time in which the defendants may not acquire publicly held WRG stock, to fit the circumstances.

The defendants erroneously assert in their Brief that this supportive prohibitory relief would result in greater illiquidity because the defendants would not thereby be able to participate in trading WRG common stock in the market (Deft's Brief, pp. 16-17). That is not at all true. The plaintiff is not seeking to enjoin the defendants from <u>selling</u> their WRG stock in the market during the prohibitory period. They would be free to do so. If they should sell WRG shares in the market, which obviously is not their wont to do, they would be increasing liquidity. It is the purchase of publicly held WRG shares by the insider that would increase the illiquidity and deprive

the public WRG shareholders, and those former shareholders who rescind, of an opportunity for a liquid market and a listing.

If the requisite number of WRG shares required by the American Stock Exchange for listing should result from the right of rescission (i.e., 400,000 publicly held shares -- insider held shares are excluded), the decree should contain a directive that WRG apply for such listing. The American Stock Exchange is not foreign to WRG common stock. As the record shows, WRG common was listed on the American Stock Exchange prior to the listing of that security on the New York Stock Exchange.

It is respectfully submitted that this Court should reverse the denial by the lower court of preliminary injunctive relief, and provide "specific guidance to the district court as to the form of relief to be granted on remand", as it did in Chris-Craft II.

II

RESPONSE TO POINT II OF DEFENDANTS' BRIEF

The defendants advert to the scope of review of this Court as being limited to a showing of clear abuse of discretion. However, the appellate court is not bound by the lower court's conclusions of law, Kane v. Branch Motor Express Co., 290 F.2d 503, 505-507 (2nd Cir. 1961); nor is the appellate court bound by the lower court's ultimate finding of fact which is but a legal inference from other facts, Lehmann v. Acheson, 206 F2d. 592, 594 (3rd Cir. 1953); nor is it bound by an ultimate finding premised on an erroneous interpretation of the standard to be applied, United States v. Parke, Davis & Co., 362 U.S. 29, 43-44,

80 S.Ct. 503, 4 L.Ed. 2d 505 (1960). Moreover, where a finding is a composite of fact and law, it is not binding on the appellate court where the factual finding is induced by error of law, or the factual finding is sound but the composite conclusion is based on error of law, <u>Official Creditors' Committee of Fox Markets v. Ely,</u> 337 F.2d 461, 467 (9th Cir. 1964), cert. denied, 380 U.S. 978 (1965). Nor is it bound by a finding which is essentially one dealing with the <u>effect</u> of certain transactions or events, rather than a finding which resolves disputed facts, <u>Stevenot v. Norberg</u>, 210 F.2d 615 (9th Cir. 1954); nor is it bound by findings unsupported by the evidence, <u>Campana Corp. v. Harrison</u>, 114 F.2d 400, 405-406 (7th Cir. 1940). Plaintiff submits that the errors in the decision of the lower court in the case at bar come within the purview of the foregoing bases for permissible review.

The defendants have dealt with the claimed violations of the Federal securities laws superficially. Initially they consider that they need not treat separately the claims asserted here under Section 10(b) and Rule 10b-5, and Section 14(e), and they proceed solely under Rule 10b-5. Of course, Section 14(e) does not have the "purchase or sale" requirement of Section 10(b) and Rule 10b-5, and those WRG stockholders who have not tendered, but who have been injured as a result of the wrongs perpetrated here can assert their claims under Section 14(e). <u>Electronic Specialty Co. v. International Controls Corp.</u>, <u>supra</u>; <u>Chris-Craft II</u>, <u>supra</u>. The <u>Birbaum</u> doctrine is not

applicable to Section 14(e). Moreover, while the cases have shown that Section 14(e) tracks Rule 10b-5, nevertheless, Section 14(e) expressly gives *statutory disjunctive treatment* between material misrepresentations and material omissions on the one hand and "*fraudulent, deceptive, or manipulative acts or practices*" on the other hand.

The plaintiff also will not bisect considerations of the claimed violations of the Federal securities laws along the lines that the defendants have drawn in their Brief. Plaintiff will start response with a core inconsistency in the defendants' conduct and position in relation to their general plan and scheme to take WRG private. The defendants predicate their purported reasons for going private on a fundamental contention that the market prices of WRG stock have not been truly reflective of the growth, earnings and business prospects of WRG and by reason of such depressed market prices, not truly responsive to the financial and business status of WRG, they seek to go private. But, in devising the package for the Exchange Offer, they deceptively geared the package value to market, and urge that market prices are "controlling." The defendants cannot properly speak out of both corners of their mouths. This is one of the fatal flaws in the chain of their fraudulent, deceptive, and manipulative plan and scheme. The defendants cannot have it both ways. If they actually do consider market prices are truly reflective here, then the entire foundation for the purported purposes and reasons for going private must collapse as a fraud and sham. On the other hand, if they actually consider the opposite to be the case, then they have wilfully

concealed and deceived the public WRG stockholders.

Moreover, we have also shown another fatal flaw in their chain. They labelled their Prospectus as "voluntary" offer; yet when pinned down on their actual fraudulent dilemma by reason of such misrepresentation, defendant Lawrence had to concede that the defendants intended to take the second "mop-up" step and go fully private, for otherwise their purported purposes and reasons for going private would have been manifestly false and misleading. Consequently, they misrepresented the "voluntary" nature of the Exchange Offer, and concealed their then intent to take the second step of the "freeze-out" if WRG did not acquire all of the WRG stock on the Exchange Offer.

The market manipulative device utilized by the defendants on the Exchange Offer is set forth at pages 51-59 of plaintiff's Principal Brief.

That the purported purposes and reasons for "going private" are not legitimate and are a sham, and that the statement in the Prospectus with respect thereto constitute false and misleading representations, is shown at pages 60-63 of plaintiff's Principal Brief.

The detailed misrepresentations and material omissions with respect to the Prospectus are set forth at pages 64-66 of plaintiff's Principal Brief. The defendants state that "most" of these claims are not pleaded in the complaint. They neglect to state, however, that all of those items were before the court below, either in the complaint, the moving papers on

the motion for preliminary injunction, or in documents produced by defendants at the hearing and introduced into evidence and urged before the Court, or elicited from witnesses at the hearing. Moreover, certain of their asterisk references in this connection are not accurate. For example, Item 6 is pleaded at ¶¶ 18 and 24(a) of the complaint.

With respect to Item 1, defendants' contentions in that respect (Defts Brief, pp. 19-20) are without substance. They purposefully included statements cast in subtle language of duress, in the context of misleading WRG stockholders to believe on the one hand that the offer was "voluntary" and on the other that they might have disadvantages or advantages if they remained stockholders, when the defendants <u>knew</u> that it was the intention to take the second-step to "mop-up" the remaining stockholders who did not tender.

As to Item 2, the concealment of the actual reasons and purposes and intent of the Exchange Offer, i.e. to place control of WRG in the directors, and particularly defendant Lawrence, and to increase their interests in the assets and earnings of WRG, is one of the major material omissions in the Prospectus. At the time, the directors owned only 13.9% of the stock, of which defendant Lawrence owned 7%. Their intended increase in ownership and vastly increased percentage interest in assets and earnings represents the core of the entire scheme. Compare, <u>Drachman v. Harvey</u>, 453 F.2d 722, <u>supra</u>.

As to Item 3, as fiduciaries in a transaction with the cestuis que trust, the defendants had an absolute duty to disclose in the Prospectus whether or not they considered the

Exchange Offer to be fair. Pepper v. Litton, supra. The proposed S.E.C. Rules considers such an omission to be material -- in fact, it is mandatory under those Rules to disclose such information. The same holds true with respect to Item 4 - furnishing an opinion on the fairness of the offer, prepared by an independent expert. " * * * the burden is on the director * * * not only to prove the good faith of the transaction but also to show its inherent fairness from the viewpoint of the corporation and those interested therein." Pepper v. Litton, 308 U.S., p. 306. The proposed S.E.C. Rules considers such omission material, and mandates its submission to the stockholders. Item 5 is responded to by the defendants through an argument of "by implication". There is no such concept applicable here. The plain fact is that a carefully worded Resolution at the WRG Board meeting completely omits any consideration by the directors that the Exchange Offer was considered by them "to be in the best interests of the Company." The representation in the Prospectus that there was such a Board consideration is false and misleading. Item 6 has already been discussed. Item 7 is a major omission. The S.E.C. proposed Rules requires such information to be disclosed, and to set forth the reasons for the agreement not to tender. Compare the reason given in the defendant's Brief, p. 23, with defendantLawrence's testimony in this respect (448a). They are different entirely. As to Items 8 and 9, a major portion of the omitted facts under those Items are deemed to be material in the S.E.C. proposed Rules. Item 10-- The defendants fail to give any cogent response to this item, in the context of the language actually used in the Prospectus.

Defendants' arguments on the matter of fraudulent, deceptive, and manipulative acts and practices is limited to a contention that plaintiff has not established deception. In this, it is submitted, they are in clear error.

Since the lower court did not at all consider or advert to the common law pendent claims, it is respectfully submitted that in setting the guidelines for the lower court, that this Court assert the application of pendent jurisdiction, as it did in Drachman v. Harvey, supra.

Notwithstanding the overwhelming number of authorities cited in plaintiff's Principal Brief that market value does not control in connection with fairness, and that investment or intrinsic value is the major criterion, the defendants cite one case in response: Matter of Marcus, 273 App.Div. 725, 79 N.Y.S.2d 76 (1st Dept. 1948). But, the Court there stated:"This does not mean that the appraisers are confined to market value or must accept market value as the value of the stock." In addition to New York cases cited at p. 56 of plaintiff's Principal Brief, that market value is not controlling and all factors must be considered, see also Matter of Fulton, 257 N.Y. 487, 178 N.E. 766 (1931); Beloff v. Consolidated Edison Co., 300 N.Y. 11, 87 N.E.2d 561 (1949). Also the landmark "freeze-out" case of Lebold v. Inland Steel Co., 125 F.2d 369 (7th Cir. 1941) mandated going concern value (at p. 374). The proposed S.E.C. Rules mandates that there shall be considered, among other factors, the value of the assets and earning power of the issuer.

Respectfully submitted,
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Of Counsel

STATE & COUNTY OF NEW YORK, SS:

ANN BADER, being duly sworn, deposes and says: I am over the age of 21 years and I am not a party to this action or otherwise interested therein.

On February 27, 1975, I served three (3) copies of the within Reply Brief of Plaintiff-Appellant, personally, upon Hughes, Hubbard & Reed, Esqs., the attorneys herein for the defendants-appellees.

Ann Bader

Sworn to before me this 27th day of February, 1975.

Notary Public, State of New York
No.
Qualified in County
Certificate filed in New York County
Commission Expires March 30, 1976